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SUPREME COURT OF THE UNITED STATES

October Term, 1981

COMMONWEALTH OF MASSACHUSETTS, et al.,
Appellants,
v.

NEW HAMPSHIRE LEGISLATIVE UTILITIES
CONSUMERS' COUNCIL,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF NEW HAMPSHIRE

BRIEF OF APPELLANT
COMMONWEALTH OF MASSACHUSETTS

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QUESTIONS PRESENTED

A sixty-eight year old statute of the State of New Hampshire, RSA 374:35, provides that the New Hampshire Public Utilities Commission (PUC) may order a corporation to cease transmitting hydroelectric energy outside of New Hampshire. Invoking this statute for the first time, the PUC ordered the New England Power Company to stop transmitting energy from its dams in New Hampshire to customers in Massachusetts and Rhode Island. The PUC further ordered that the Company make arrangements to sell the previously exported hydroelectric power to utility companies within New Hampshire. In the final judgment appealed from, the Supreme Court of New Hampshire affirmed the PUC's orders and remanded for the mechanics of implementation. The intended and actual effect of the decision is to secure the economic benefits of hydroelectric energy generated in New Hampshire exclusively for its citizens at the direct expense of Massachusetts and Rhode Island and their citizens. The questions presented are:

(1) Whether Part I of the Federal Power Act, which establishes a broad regulatory scheme conditioning the construction, operation and maintenance of hydroelectric projects on navigable waters, preempts the operation of the New Hampshire statute as construed and applied by the New Hampshire Supreme Court and the PUC.

(2) Whether Part II of the Federal Power Act, which grants the Federal Energy Regulatory Commission comprehensive and exclusive jurisdiction over wholesale electric rates in interstate commerce, preempts the operation of the New Hampshire statute as construed and applied by the New Hampshire Supreme Court and the PUC.

(3) Whether the New Hampshire statute as construed and applied by the New Hampshire Supreme Court and the PUC constitutes an undue burden upon interstate commerce in violation of the Commerce Clause of the United States Constitution.

(4) Whether the New Hampshire statute as construed and applied by the New Hampshire Supreme Court and PUC violates the privileges and

immunities of the citizens of Massachusetts in contravention of Article IV, §2 of the United States Constitution.

(5) Whether, assuming that Congress has exempted the New Hampshire statute from the reach of the Commerce Clause, Congress has violated that clause by favoring one state over another in an area of fundamental economic and social importance, or, alternatively, has violated the rights of the Commonwealth of Massachusetts and its citizens as guaranteed by the Tenth Amendment and the Privilege and Immunities Clause.

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OPINIONS BELOW

The opinion of the New Hampshire Supreme Court, dated December 23, 1980, is reported at 424 A.2d 807 (N.H. 1980) and is reprinted in the appendix to the Jurisdictional Statement of New England Power Company in No. 80-1208 (J.S. App. 1a-14a).

The New Hampshire Public Utility Commission's (PUC) Reports and Orders dated August 27, 1980 (J.S. App. 15a-24a), and September 19, 1980 (J.S. App. 25a-40a), are unreported.

JURISDICTION

This is an appeal from a final opinion and judgment of the New Hampshire Supreme Court which rejected the arguments of the Commonwealth of Massachusetts that the New Hampshire hydroelectric export statute (RSA 374:35), as construed and applied by the PUC's orders, was preempted by Part I and Part II of the Federal Power Act and violated the Commerce Clause and the Privileges and Immunities Clause and the Tenth Amendment of

the United States Constitution. Judgment was deemed to have been entered on December 23, 1980, when the decision of the highest court of the state of New Hampshire was docketed by its clerk. The Commonwealth filed its notice of appeal (80-1471) on January 15, 1981, Mass. J.S., appendix B, which was docketed in this Court on February 27, 1981. Probable jurisdiction was noted on May 18, 1981, and this case was consolidated with Nos. 80-1208 and 80-1610. See __ U.S. _, 101 S.Ct. 2311 (1981). This Court has jurisdiction of this appeal under 28 U.S.C. §1257(2).[1/]

1/ Massachusetts, on its own behalf and in its parens patriae capacity, intervened in on-going administrative proceedings before the PUC. (J.A. 1a). Massachusetts then sought judical review in the New Hampshire Supreme Court and, after judgment, appealed to this Court. There was no need for the Commonwealth to attempt to invoke this Court's original jurisdiction, because of "the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972). See also Maryland v. Louisana, __ U.S. _, 101 S.Ct. 2114, 2123-2128 (1981).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant portions of the Federal Power Act and the texts of the Commerce Clause, the Supremacy Clause, the Privileges and Immunities Clause and the Tenth Amendment are set forth in the appendix to this brief.

The New Hampshire hydroelectric export statute, N.H. Rev. St. Ann. §374:35 (RSA 374:35), provides in full:

> Transmitting Electricity Out of the State.
>
> Permission Required. No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention to do so with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical

energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use.

STATEMENT OF THE CASE

1. The Facts.

The New England Power Company (NEP) is a public utility engaged in the generation and transmission of electricity at wholesale throughout New England. (J.A. 10a). NEP's generating facilities are powered by various energy sources, such as coal, oil, nuclear and water. (J.A. 11a). Six of its water-powered facilities are located along the Connecticut River in New Hampshire and Vermont,[2/] with most of that generating capacity — 420 megawatts — located in New Hampshire. (J.A. 8a-9a, 21a). All of these hydroelectric facilities are licensed by the Federal Energy Regulatory Commission (FERC). (J.A. 10a).

2/ The Connecticut River is a navigable body which travels through New Hampshire and Vermont and continues into Massachusetts and Connecticut.

The power from NEP's hydroelectric plants flows into a "grid" which encompasses the entire six-state New England region. Ninety-eight percent of all bulk electric generating units in the region are similarly connected to the grid. (J.A. 29a). Electricity flows freely through the grid irrespective of the type of generating plant or geographical boundaries. (J.A. 33a). For example, a consumer of electricity in Rhode Island could not determine whether the power used at a particular moment was created in an oil-fired plant in New Hampshire, a nuclear-powered plant in Connecticut or a water-powered plant in Massachusetts. (J.A. 35a) Decisions as to which power plants can be most economically used to generate electricity at any given time are made by a central computer operated by the New England Power Pool (NEPOOL), of which NEP and virtually all other bulk electric generating utilities in New England are members. (J.A. 33a). "The objectives of

NEPOOL, both near- and long-term, are to enable all electric utilities in New England, large and small, with or without their own generating capacity, to obtain an equitable share of such benefits as reliable interconnection, economies of scale, emergency protection, long-range planning, and the like." (J.A. 12a). In 1979, for example, the NEPOOL dispatch saved its members approximately 44 million dollars. (J.A. 34a).

Hydroelectric generation fluctuates because of "seasonable variations in river flow." (J.A. 13a). During the annual spring run-off, for example, it can be exported for longer periods than during the balance of the year, where it "can only be used effectively as a source of peaking power." (J.A. 13a). During such periods when power is low, New Hampshire depends upon energy from NEPOOL which originates in other states. (J.A. 11a).

NEP's principal customers are three retail affiliates which resell electricity at retail to over one million customers in Massachusetts, Rhode Island and New

Hampshire. (J.A. 7a). Seventy-five percent of this power is sold in Massachusetts. Although all electricty in the grid flows freely to the place where it is needed, the cost and benefits of NEP's hydroelectric units, as well as its other units, are allocated specifically to its retail affiliates' customers in the three states. The manner in which these paper allocations are made is determined both by rates and contracts approved by FERC and by a NEPOOL agreement approved by FERC. (J.A. 33a).

In its order and decision, the PUC found that the effect of redirecting the benefits of NEP's New Hampshire hydroelectric facilities solely to New Hampshire consumers would be a savings of approximately $25 million per year. (J.S. App. 35a). Consequently, the additional cost to Massachusetts consumers would be 75 percent of that figure, or about $18,750,000 per year. A substantial portion of that increased cost would fall on the Commonwealth itself as a consumer of electrical

energy. (J.A. 58a, 61a-62a). Moreover, Massachusetts contends that the economic impact will be much greater than the PUC estimated due to the high cost of replacement fuel such as oil. The real effect of the PUC's order, according to the Commonwealth's experts, will be an increased cost to Massachusetts consumers of between $51.9 million and $111.5 million per year. (J.A. 62a). The order will also impact adversely on consumers in Rhode Island.

2. The Proceedings Below.

For the first time since the hydroelectric export statute, RSA 374:35, was enacted in 1913, the PUC on November 21, 1979, instituted an investigation pursuant to the statute to determine whether it should withdraw permission previously granted to NEP to export its hydroelectric energy outside of New Hampshire. (J.A. 3a-5a). In December, 1979, NEP moved to dismiss the proceedings on the grounds that RSA 374:35 could

not constitutionally be applied by the PUC because of its undue burden on interstate commerce and because Parts I and II of the Federal Power Act preempted the statute. (J.A. 1a). The PUC deferred ruling on the motion and conducted hearings on the state law questions of whether hydroelectric power was reasonably required for use in New Hampshire and whether the public good required that hydroelectric power be reserved exclusively for New Hampshire consumers. (J.A. 1a).

The Commonwealth of Massachusetts, on behalf of itself and its citizens, intervened and participated in those hearings. (J.A. 1a). The Commonwealth presented argument on the state law questions, maintaining that implementation of the statute would be contrary to the NEPOOL philosophy of providing efficient and reliable electric service through regional cooperation. Any breakdown in this regional approach would ultimately result in a decrease of benefits to the citizens of New

Hampshire. Massachusetts also argued that a ban on hydroelectric exportation would violate the Commerce, Due Process, and Privileges and Immunities Clauses of the United States Constitution.

On August 27, 1980, the PUC denied NEP's motion to dismiss (J.S. App. 15a-24a), and on September 19, 1980, it issued its Report and Order on the merits. (J.S. App. 25a-40a). Finding that the statutory prerequisites of "reasonably required for use" and required for "the public good" had been met, the PUC invoked RSA 374:35 to prohibit the export of hydroelectric energy by NEP and to order NEP to sell the energy exclusively within New Hampshire.

At the same time, it was clear that NEP was not to physically "snip the wires" to prevent hydroelectric energy from flowing out of New Hampshire. The physical flow of electricity into and out of the state through the NEPOOL grid was not to be impeded. Rather, NEP was to change its rates and contracts to bestow the economic

benefit on New Hampshire consumers without sacrificing various NEPOOL benefits such as reliable energy from oil, coal, water and nuclear powered plants in Massachusetts and other New England states.

Massachusetts unsuccessfully moved for a rehearing on the grounds that the PUC's order violated the Commerce Clause, the Supremacy Clause, the Federal Power Act, and was not authorized by RSA 374:35. (J.A. 1a).

NEP timely appealed the PUC's order to the New Hampshire Supreme Court. Massachusetts and Rhode Island joined as appellants. (J.A. 1a-2a). The New Hampshire Legislative Utility Consumers' Council (LUCC), the adversary party before the PUC, also joined in the appeal.

After hearing, the court on December 23, 1980, rejected the appellants' federal and state law arguments and upheld RSA 374:35 as applied by the PUC. It ruled that the statute as applied was not preempted either by

Part I of the Federal Power Act (because the statute did not conflict with FERC's licensing power) or by Part II of that Act (because Congress had exempted the New Hampshire statute from what otherwise would have been the preemptive effect of Part II). (J.S. App. 4a-8a). The court found no conflict between the statute or the PUC's order and the Commerce Clause, again relying on the view that Congress had specifically exempted statutes such as New Hampshire's from the reach of the Commerce Clause. (J.S. App. 10a-12a).

The court also rejected Massachusetts' arguments that, if Congress had elevated New Hampshire to a privileged position with respect to the interstate transmission of electric power, Congress had acted contrary to the intent of the Commerce Clause and had violated the constitutional rights of the Commonwealth and its citizens under the Tenth Amendment and the Privileges and Immunities Clause. (J.S. App. 8a-10a). The court also upheld the PUC's order on state law grounds. (J.S. App. 12a-14a).

The Court remanded the case to the PUC "for the parties to develop the mechanics of implementation." It ordered NEP to "make appropriate adjustments and filings with the appropriate federal and state administrative agencies to enable New Hampshire to regain the benefit of its hydroelectric power." (J.S. App. 14a).

No action has yet been taken by the PUC, pending a decision by this Court on the appeals.

SUMMARY OF ARGUMENT

This case represents yet another instance in which the Court is asked to judge the actions of one state which seeks special advantages with respect to natural resources found within its borders. Here, the Public Utility Commission (PUC) of New Hampshire has ordered that hydroelectric power generated within New Hampshire must be sold within New Hampshire and that the economic benefit derived from such power must be afforded solely to New Hampshire citizens, to the direct

detriment of their neighbors in Massachusetts and Rhode Island. This brief is devoted to reviewing the doctrinal impediments to this parochial action and to considering the "defense" offered by New Hampshire, that Congress has granted it authority to take such action.

I.

Massachusetts first argues that the the state statute, RSA 374:35, is preempted by two parts of the Federal Power Act and, therefore, violates the Supremacy Clause. After briefly outlining the criteria developed by this Court in assessing such claims, Part I of the Act is reviewed. It is argued that Congress created a broad regulatory scheme governing the issuance of licenses for hydroelectric projects on navigable waters. The license is expressly conditioned upon the generated power being used to benefit interstate commerce. Moreover, the legislative history and decisions of this Court underscore the broad and national scope of Part I. The PUC's order is

directly at odds with the development and maintenance of hydroelectric power for national and interstate needs rather than for local advantage. As such, the order conflicts with Part I of the Act.

Preemption under Part II of the Act is even more apparent. Congress has unmistakenly prohibited States from setting rates for the sale of electric energy at wholesale. Following this Court's decision in Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Co., 273 U.S. 83 (1927), Part II was enacted to create a detailed framework for the exercise of federal authority, which now resides with FERC. It is FERC alone which sets such rates and which allocates the financial burdens among customers. Most telling, Congress has explicitly barred the sort of parochial preferential treatment in the allocation of costs at issue here.

The PUC's order, by its very terms and as further explained by the New Hampshire Supreme Court, has one purpose: to give the New Hampshire consumers the

economic benefits of hydroelectric power. Instead of cutting the state off from the considerable advantages of participating in the NEPOOL grid, however, the PUC required NEP to seek a rate adjustment from FERC. The goal, method and result of this order all directly conflict with Part II of the Act. "At the very least, there is an 'imminent possibility of collision....'" Maryland v. Louisiana, __ U.S. _, 101 S.Ct. 2114, 2131 (1981).

In response, the appellees maintain that Section 201(b) of Part II, 16 U.S.C. §824(b), contemplates the PUC exercising the authority it now uses for the first time since the state statute was passed in 1913. The PUC order, it is claimed, falls within the state "lawful authority now exercised" language of Part II. There are two reasons why this argument should fail. First, §201(b) does not apply to Part I of the Act, which independently of Part II preempts the PUC order. Secondly,

Massachusetts submits that the terms of §201(b) represent a slender basis upon which to find a Congressional grant of authority to the few states which arguably fit into this exception. The more common-sense reading is to consider §201(b) a "saving clause," which did not add to state authority. Since this Court had, before the passage of Part II, determined that States had no authority when it comes to wholesale rates, it is hard to premise an interpretation of §201(b) which assumes the contrary. An analysis of "saving clauses" in other federal statutes, as interpreted by this Court, supports this view.

Moreover, whatever state authority, if any, that the PUC was exercising with respect to hydroelectric power at the time Part II was passed, did not include the allocation of costs among consumers of such power. It cannot be said, therefore, that the PUC order meets the "now exercised" component of §201(b).

II.

Apart from the Supremacy Clause, the state statute, as interpreted by the PUC, also violates the Commerce Clause. Since the sale of power across state lines is clearly interstate commerce and since the PUC order discriminates against citizens from other states, it is the type of economic protectionism which is per se invalid. The appellees do not even attempt to justify the PUC order as satisfying some legitimate state concern. Indeed, the order stands as a stark example of the balkanizing action the Framers sought to avoid. Moreover, as discussed above, §201(b) cannot be read to be a congressional delegation of its plenary power to regulate interstate commerce. It is unlikely that this broad federal authority would be exercised to sanction a state policy so at odds with national objectives.

III.

Massachusetts, on behalf of its citizens, also argues that the state statute, as interpreted, violates the Privileges and Immunities Clause. The PUC's application of the state statute directly implicates the fundamental concerns of that clause, which is intended to "constitute the citizens of the United States [as] one people." Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868). In effect, by denying non-residents equal access to hydroelectric power, the PUC has acted in a manner which discriminates in an area of "profound and national importance." Hicklin v. Orbeck, 437 U.S. 518, 534 (1978). Moreover, the appellees have shown no substantial rational basis upon which the PUC's order can stand.

IV.

Massachusetts argues that the state statute, as interpreted by the PUC, runs afoul of the Supremacy, Commerce and Privileges and Immunities Clauses. In the

course of these arguments, it is demonstrated that §201(b) of the Federal Power Act does not represent an affirmative grant of power to New Hampshire so as to congressionally authorize what would otherwise be unlawful. If the Court disagrees with this "savings clause" view of §201(b), however, a distinct and novel set of issues is presented. This so because the Court would then be faced with a congressional grant of authority to a few states, at the direct expense of neighboring states, without any apparent justification for such special treatment. Reliance on the broad authority invested to Congress under the Commerce Clause for this legislation is misplaced. The Framers of the Constitution yielded state authority in the area of interstate commerce for national and common purposes, not to be placed at a competitive disadvantage. In other instances where Congress has acted selectively, it has done so to resolve a problem unique to certain states, with the stated purpose of furthering the flow of interstate commerce. Nor can

§201(b) be rationally supported by reference to unique geographical circumstances or problems. In short, Congress' authority under the Commerce Clause has been exceeded.

There are, in addition, certain constraints external to the Commerce Clause which serve to annul §201(b), if interpreted as the appellees suggest. Specifically, it is argued that a special grant of power to a few states — used here to place Massachusetts and its citizens in an inferior position — exceeds the dictates of the Tenth Amendment. Although the PUC's order does not fit squarely into the three-part test recently articulated in Hodel v. Virginia Surface Mining and Reclamation Association, Inc., __ U.S. __, 49 U.S.L.W. 4654 (U.S. June 16, 1981), §201(b) is every bit as destructive to the State's integrity as that found unacceptable in National League of Cities v. Usery, 426 U.S. 833 (1976). Similarly, congressional action is limited in these unique circumstances by the Privileges and Immunities Clause.

For all these reasons, Massachusetts urges that the decision of the New Hampshire Supreme Court be reversed.

ARGUMENT

I. THE NEW HAMPSHIRE STATUTE AS APPLIED BY THE PUC IS PREEMPTED BY FEDERAL LAW.

Massachusetts first addresses questions of federal statutory law. In particular, it is argued that RSA 374:35, as construed and applied by the PUC, conflicts with two portions of the Federal Power Act and must, therefore, be declared invalid under the federal statute and under the Supremacy Clause of the United States Constitution. The federal statutory provisions in question are Part I of the Federal Power Act (requiring licensure of hydroelectric facilities to conform to a broad regulatory scheme) and Part II of the Act (establishing comprehensive and exclusive federal jurisdiction over wholesale electric energy rates in interstate commerce).

After briefly describing the standards for determining when state action is preempted by federal law, Massachusetts will discuss Part I and Part II of the Federal Power Act in turn.

A. The Supremacy Clause Prohibits State Action Which Conflicts With Federal Law.

Fundamental to our federal system of government is the principle, embodied in the Supremacy Clause of the United States Constitution (Art. VI, cl. 2),[3/] that state action which conflicts with federal legislative policy must give way to the admittedly superior right of the federal law. E.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210-11 (1824); Cooper v. Aaron, 358 U.S. 1, 18 (1958). "It is basic to this constitutional command that all conflicting state

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3/ "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the Supreme Law of the Land...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

provisions be without effect." Maryland v. Lousiana, __ U.S. _, 101 S.Ct. 2114, 2129 (1981). As this Court's decisions have indicated, federal preemption of state law can be found under several sets of circumstances. "Under the relevant cases, one of the legitimate inquiries is whether Congress has either explicitly or implicitly declared that the States are prohibited from regulating [those areas] with which the [federal statute] is concerned." Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978). Thus, the fact that there may be no express provision of preemption in the federal act is not decisive, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973), since this congressional purpose may be evidenced in several ways:

> The scheme of federal regulation may be so pervasive as to make reasonble the inference that Congress left no room for the States to supplement it.... Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.... Likewise, the object

> sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. ... Or the state policy may produce a result inconsistent with the objective of the federal statute. ...

Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947), quoted in Maryland v. Louisiana, 101 S.Ct. at 2129 (citiations omitted).

Moreover, even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. Ray v. Atlantic Richfield Co., 435 U.S. at 158. See Maryland v. Louisiana, 101 S.Ct. at 2129. A conflict will be found "where compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

See also Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977). In considering a preemption claim, however, "it is necessary to look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict." Commonwealth Edison Co. v. Montana, __ U.S. __, 49 U.S.L.W. 4957, 4964 (U.S. July 2, 1981).

With these principles in mind, Massachusetts will now examine Part I and Part II of the Federal Power Act. It will be demonstrated that the New Hampshire statute as applied is preempted by Part I of the Federal Power Act because the New Hampshire statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress — the development of the nation's water resources for the benefit of interstate commerce — and will therefore produce a result inconsistent with the objectives of the federal statute. Massachusetts will also show that RSA 374:35, as construed and applied by the PUC, is preempted by Part II

of the Federal Power Act. This is so because the effect of the PUC's order is to allow New Hampshire to engage in interstate wholesale rate making, while Congress, with the enactment of Part II, prohibited the States from engaging in this activity.

B. Preemption Under Part I Of The Federal Power Act.

Part I of the Federal Power Act (the Act) (16 U.S.C. §§ 792-823) was originally enacted in 1920 as the Federal Power Act. That statute established a broad regulatory scheme which conditioned the construction, operation, and maintenance of hydroelectric projects on navigable waters upon the issuance of a license by the Federal Energy Regulatory Commission (FERC).[4/]

Section 4(e) of the Act (16 U.S.C. §797[e]) establishes general licensing jurisdiction over any person desiring to construct or operate a facility for the development,

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4/ The functions of the former Federal Power Commission were transferred to FERC in 1977. 42 U.S.C. §§7101 et seq. The abbreviation "FERC" will be used to refer to both agencies.

transmission and utilization of water power on navigable waters, while Section 23(b) (16 U.S.C. §817) prohibits the construction of nonlicensed hydroelectric projects on navigable streams.[5/] Section 10(a) (16 U.S.C. §803[a]) conditions the granting of a license upon a finding by FERC that the project "will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce. . . ." 16 U.S.C. §803(a).

Appellees argued below that Part I of the Act is inapplicable to these proceedings. Appellees contended, and the New Hampshire Supreme Court agreed, that Part I pertains only to licensure, and that the PUC's order neither challenged the licenses granted by FERC nor required compliance with RSA 374:35 as a condition precedent to the securing of a federal license. (J.S. App. 5a).

5/ All the hydroelectric projects at issue here are licensed under Part I of the Act. (J.A. 10a).

Such a contention, however, is clearly misplaced, as the impact and purpose of Part I extend far beyond the mere granting and revocation of license. Instead, Part I establishes the framework for a "comprehensive plan" for the benefit of interstate commerce.[6/] Moreover, the intended breadth of Part I is demonstrated both by its legislative history and this Court's decisions.

The intent of Congress in enacting the legislation was to establish federal development and control "of hydroelectric power to meet the needs of an expanding economy." Federal Power Commission v. Union Electric Co., 381 U.S. 90, 99 (1965) (Union Electric). Part I of the Act "was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the

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6/ Indeed, Part I is contained in a subchapter entitled "Regulation of Development of Water Power and Resources."

comprehensive development of the water resources of the Nation, insofar as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive approach of ... other federal laws previously enacted." First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n, 328 U.S. 152, 180 (1946) (First Iowa). "'With all its faults the Federal Water Power Act of 1920 marked a great advance. It established firmly the principle of federal regulation of water power projects. ...' The ... Act was distinctly an effort to provide federal control over and give federal encouragement to water power development." Id. at 180 n.23, quoting Pinchot, "The Long Struggle for Effective Federal Water Power Legislation," 14 Geo.Wash.L.Rev. 9, 19 (1945).7/ Clearly, "the

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7/ In recommending passage of Part I, the House Report stated: "The increasing need of power, resulting through our participation in the war and growing shortage in certain sections of our coal and oil supply, compelled attention to the urgency of immediate and comprehensive water-power legislation." H.R. Rep. No. 61, 66th Cong., 1st Sess. 4 (1919). The House Report also contained a report by Secretary of Agriculture David F.

footnote continued

comprehensive development of water power, insofar as it was within the reach of the federal power to do so..." was "the central thrust of the Act." Union Electric, supra at 101.

Thus, it is apparent that in enacting Part I Congress intended to do much more than to simply establish a federal licensing mechanism. Rather, the licensing process serves as a mechanism for carrying out the central purpose of the Act which was "to provide for the comprehensive control over those uses of the nation's water resources in which the Federal Government had a legitimate interest; these uses included ... hydroelectric power-uses which, while unregulated, might well be contradictory rather than harmonious." Union Electric, supra at 98 (emphasis added).8/

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footnote 7/ continued

Houston in which he stated: "The problems are national, rather than local; they transcend state lines and cannot be handled adequately except by or in conjunction with national agencies." Id. at 5.

8/ States are permitted, however, to regulate intrastate service and rates. 16 U.S.C. §812. Where Congress has provided a role for the States in this area, it has done so explicitly. See First Iowa, supra at 173-176.

There can be little doubt that RSA 374:35, as construed and applied by the PUC, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of Part I, Hines v. Davidowitz, 312 U.S. at 67, and "produce[s] a result inconsistent with the objective" of Part I. Rice v. Santa Fe Elevator Corp., 331 U.S. at 230.

The PUC's order prohobits NEP from selling the output of its licensed hydroelectric units in New Hampshire to customers outside of the state. This order is a clear impediment to the accomplishment of the purposes of Part I —the development of hydroelectric power for national and interstate needs rather than for local or parochial advantage. Moreover, as discussed above, under Section 10(a) of the Act (16 U.S.C. §803[a]) each of the hydroelectric projects at issue in this case had to make a satisfactory showing to FERC that the operation of the project would benefit interstate commerce. The PUC's order frustrates the intent

of this statutory requirement and produces a result inconsistent with the objectives of Part I. To hold otherwise would be, in the words of this Court, to grant to New Hampshire "a veto power [which] easily could destroy the effectiveness of the Federal act ... [by] subordinat[ing] to the control of the [s]tate[s] the 'comprehensive' planning which the Act provides shall depend upon the judgment of [FERC] or other representatives of the Federal Government." First Iowa, supra at 164.

In sum, the Court should find the statute, as interpreted by the PUC, to be preempted by Part I of the federal act. In the next section it is argued that an analysis of Part II yields the same result.

C. Preemption Under Part II Of The Federal Power Act.

Massachusetts also argues that RSA 374:35, as construed and applied, is preempted by Part II of the Federal Power Act. In this section of its brief, the Commonwealth first describes the exclusive nature of FERC's jurisdiction over interstate wholesale rates, and further asserts that the PUC's orders interfere with this exclusive jurisdiction. Next, Massachusetts maintains that the "savings clause" contained in §201(b) of Part II of the Act (16 U.S.C. §824[b]) does not authorize or validate the PUC's orders.

1. FERC Has Exclusive Regulatory Authority Over Interstate Wholesale Sales of Electricity.

Part II of the Federal Power Act (16 U.S.C. §§ 824-824k) was enacted in 1935 and grants FERC comprehensive and exclusive jurisdiction over wholesale rates in interstate commerce. Federal Power Commission v. Southern California Edison Co., 376 U.S. 205, 215 (1964)

(City of Colton). Part II was enacted by Congress to "fill the gap" left by the decision in Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927) (Attleboro), which held that States are prohibited by the Commerce Clause from regulating interstate wholesale rates. As this Court has explained: "Part II is a direct result of Attleboro. They are to be read together. The latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales." United States v. Public Utilities Commission of California, 345 U.S. 295, 311 (1953) (California).

The general intent and scope of Part II is set forth in §201(a) of the Act (16 U.S.C. §824[a]) in which Congress declared federal regulation of the sale of electric energy at wholesale in interstate commerce to be necessary and in the public interest. More specifically, §201(b) provides that the Act shall apply "to the transmission of

electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. §824(b).

The ratemaking provisions of Part II are set forth in §§205 and 206. 16 U.S.C. §§824d and 824e. These sections subject interstate wholesale electric rates to comprehensive federal regulation. Wholesale rates must be filed with FERC, and no filed rate can be changed except in accordance with the procedures set forth in those sections. 16 U.S.C. §§ 824d(c) and (d). The Act also gives FERC broad investigatory powers over existing rates — in the event FERC finds a rate to be unlawful, it can determine the appropriate rate to be charged thereafter. 16 U.S.C. §824e(a). Of particular importance to this case are the provisions of §205(b) which provide as follows:

> (b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice

> or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

16 U.S.C. §824d(b)(emphasis added). Thus, a review of the statutory scheme established by Congress with the enactment of Part II clearly demonstrates that the legislative intent was to provide for exclusive federal control over interstate wholesale electric rates with no room for interference either directly or indirectly by the States.

Decisions by this Court have also consistently stressed the broad reach and pervasive nature of federal jurisdiction over interstate wholesale ratemaking. For example, in Federal Power Commission v. Florida Power & Light Co., 404 U.S. 453 (1972), FERC claimed jurisdiction over a utility operating in southern Florida solely on the basis that some out-of-state energy on occasion reached the utility's facilities and vice-versa.

This Court upheld FERC's action, noting that FERC jurisdiction attached no matter how small the quantity of interstate energy involved. 404 U.S. at 461 n.10.

Similarly, in City of Colton, supra, the Court upheld FERC's claim of jurisdiction over the sale of electricity at wholesale by Southern California Edison Company (operating exclusively within California) to the City of Colton, California, which then distributed the electricity at retail within the city. FERC relied upon the fact that "out-of-state energy...was included in the energy delivered by Edison to Colton..." 376 U.S. at 208. Edison and Colton challenged FERC's assertion of jurisdiction, relying on the limitation contained in §201(a) which provided that federal regulation was "to extend only to those matters which are not subject to regulation by the States." The Court, however, upheld FERC's authority finding that the clear grant of power to FERC under Section 201(b) of Part II over "the sale of electric

energy at wholesale in interstate commerce" took precedence over the very general statement of policy found in §201(a), and that "Congress meant to draw a bright line easily ascertainable between state and federal jurisdiction ..." Id. at 215. Cf. Arkansas Louisiana Gas Co. v. Hall, _ U.S. _, 49 U.S.L.W. 4947, 4949 (U.S. July 2, 1981) (Congress has exclusive rate regulation over natural gas in interstate commerce).

Thus, it is apparent both from the statutory language and judicial interpretations that Congress has enacted a complete and comprehensive scheme for federal interstate ratemaking, and that it was the intent of Congress to prohibit state regulation in this area. This intent is indicated both by the pervasive nature of the statutory scheme, and by the congressional finding, as articulated by the pronouncement that federal regulation of interstate wholesale rates is in the public interest (16 U.S.C. §824[a]), that the federal interest is dominant.

2. The PUC's Order Directly Conflicts With FERC's Exclusive Authority Over Interstate Wholesale Rates.

The appellees attempt to escape from the clear conclusion that the PUC's actions "trespass on the authority of the federal agency," Maryland v. Louisiana, supra at 2131, by claiming that the PUC's order does not involve ratemaking and thus does not conflict with FERC's jurisdiction. Such an assertion misconstrues both the effect of the PUC's order and the scope of federal jurisdiction.

The PUC order withdrew NEP's permission to transmit hydroelectric energy out of the state; it ordered NEP instead to "make arrangements to sell the previously exported hydroelectric energy to persons, utilities and municipalities within the State of New Hampshire. ..." (J.A. 40a). While the PUC order is vague as to how NEP is to make these arrangements, it is plain that the PUC did not intend that NEP isolate its hydroelectric units from the NEPOOL transmission network by "snipping

wires" or opening transmission ties. See Connecticut Light & Power Co. v. Federal Power Comm'n, 324 U.S. 515, 518-519 (1945).[9/] Instead, the PUC order by its very terms attempts to effectuate a redistribution of the economic benefits of NEP's hydroelectric units without disturbing the actual dispatch of those units by NEPOOL as a part of the integrated regional bulk power supply system.[10/] That the PUC's order in effect was nothing more than attempted ratemaking is plainly evident.

9/ "The Court has said of Part II of the Power Act that federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental test. Federal Power Comm'n v. Southern Cal. Edison Co., 376 U.S. 205, 209 n.5 (1964).

10/ This conclusion is buttressed by the testimony of Russell Holden, Vice President of NEP:

> Of course, as a practical matter, flows of power in an interconnected system cannot be controlled. Consequently, short of isolating electric facilities in New Hampshire from those in neighboring states, there is no way physically to prevent power generated at a New England Power hydroelectric station in New Hampshire from being transmitted to a point outside the state. (J.A. 14a).

Moreover, the fact that the New Hampshire statute, under which authority the PUC acted, speaks in physical terms,[11/] does not prevent the Court from analyzing the true effect and intent of the PUC's order. This Court has indicated that in determining whether state action is preempted by federal law, the Court must "consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." Jones v. Rath Packing Company, 430 U.S. 519, 526 (1977). Here, "[t]he federal regulatory scheme leaves no room either for direct state regulation of interstate wholesales of [electric power] ..., or for state regulation which would indirectly achieve the same result." Northern Natural Gas Company v. State Corporation Commission, 372 U.S. 84, 91 (1963) (state regulation requiring company to take ratably from all natural gas wells with

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11/ In pertinent part, RSA 374:35 provides: Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part...." (emphasis added.)

which it contracted amounted to indirect state ratemaking and was therefore invalid as it invaded the exclusive jurisdiction which the Natural Gas Act conferred upon FERC over transmission and sale of natural gas in interstate commerce for resale).

The New Hampshire Supreme Court clearly recognized the reality of the PUC's order: "Its [N.H. RSA 374:35] purpose is to give New Hampshire the benefit of that power of which its residents now only get about six percent. ... Rates to New Hampshire consumers are higher due to the lack of access to New Hampshire's major hydroelectric stations' output; the dollar savings to New Hampshire consumers, if the power is sold within this State, would be substantial."[12/] (J.S. App. 13a).

12/ This savings, of course, is shifted to neighboring states and their consumers. Massachusetts, for example, estimates that the PUC's order will result in an increased cost of between $51.9 million and $111.5 million to Massachusetts and its consumers, (J.A. 62a). New Hampshire does not attempt to justify this step in the name of conservation or some other purpose. By its very terms and effect, the PUC's order amounts to economic and energy protectionism in its starkest form.

Indeed, the New Hampshire Supreme Court recognized that the inevitable consequence of its decision would be to require NEP to petition FERC "to adjust its rulings to accommodate the [New Hampshire] statute," Maryland v. Louisiana, supra at 2131, and the Court went so far as to remand the matter to require NEP to make appropriate rate filings. (J.S. App. 14a).[13/]

13/ A request by NEP to FERC for a rate adjustment based on the PUC's order would seem clearly to violate the intent of §205(b) of the Act which prohibits discriminatory charges as between localities. 16 U.S.C. §824d(b). Such a rate increase would "create precisely the sort of Balkanization of interstate commercial activity that the [Act] was intended to prevent." Douglas v. Seacoast Products, Inc., 431 U.S. 265, 286 (1977) (citations omitted). Indeed as the testimony of Russell Holden indicates:

> "FERC —and FPC before it —has consistently required uniform rates for all customers taking similar service under similar conditions, regardless of whether some of them were located near hydroelectric stations, or fossil fuel fired stations, or remote from any power source at all. The rates have always been set on the basis of New England Power's overall costs, not on the source from which the customer receives power." (J.A. 17a)

Any doubt as to the "imminent possibility of collision," Northern Natural Gas Co. v. State Corporation Comm. of Kansas, 372 U.S. at 92, between the PUC's orders and the federal statute is resolved by this Court's recent decision in Maryland v. Louisiana, supra. In that case, the Louisiana legislature enacted a tax of seven cents per thousand cubic feet of natural gas on the "first use" of any gas imported into Louisiana which was not subject to a severance tax. The Act also purported to establish the legal effect of the tax in terms of defining the proper allocation of the tax among potentially liable parties. This tax was challenged by several states (including Massachusetts) on the ground, inter alia, that the operation of the tax violated the Supremacy Clause. The States claimed that the First Use Tax invaded FERC's exclusive jurisdiction over interstate wholesale rates of

natural gas pursuant to the Natural Gas Act,[14/] 15 U.S.C. §§717a-717w as amended by the Gas Policy Act of 1978. The Court agreed with the States' claims and ruled that the Louisiana statute was preempted by the Natural Gas Act and therefore violated the Supremacy Clause of the Constitution. It was apparent that the effect of the Louisiana statute was "to interfere with the FERC's authority to regulate the determination of the proper allocation of costs associated with the sale of natural gas to consumers," and that the operation of the statute was "akin to state [rate] regulation." Id. at 2130, 2131. The Court also rejected the view that the FERC orders could be adjusted so that the state and federal laws "can mesh without conflict" and held that the Louisiana statute is:

14/ This Court has on numerous occasions noted that the jurisdictional scope of §201(b) of the Federal Power Act (16 U.S.C. §824[b]) and §1(b) of the Natural Gas Act, (15 U.S.C. §717[b]) are virtually identical. United States v. Public Utilities Commission of California, 345 U.S. 295, 310 (1953); City of Colton, 376 U.S. at 214-215; Interstate Natural Gas Co. v. Federal Power Commission, 331 U.S. 682, 689-90 (1947).

> ... inconsistent with the federal scheme and must give way. At the very least, there is an imminent possibility of collision. ... The FERC need not adjust its rulings to accommodate the [state] statute. To the contrary, the State may not trespass on the authority of the federal agency. Id. at 2131.

Here, New Hampshire's action is also akin to rate regulation. NEP should not be required to seek an adjustment of its rates with FERC in order to avoid conflict between the State and federal schemes. Accordingly, as the federal regulatory scheme leaves no room for either direct or indirect state rate regulation, this Court should invalidate New Hampshire's action as violative of Part II of the Federal Power Act and, therefore, the Supremacy Clause of the United States Constitution.

3. The PUC's Construction and Application of the New Hampshire Statute Is Not Authorized or Validated by Section 201(b) of Part II.

The New Hampshire Supreme Court virtually conceded that the state statute might be invalid (J.S. App. 10a). The Court, however, agreed with appellees'

assertion that §201(b) of Part II of the Federal Power Act provides an affirmative grant of power by Congress to New Hampshire and a small number of other states to regulate the exportation of hydroelectric energy (J.S. App. 7a, 10a). That section provides that:

> The provisions of this subchapter ... shall not apply to deprive a state or state commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a state line. 16 U.S.C. §824(b).

In this section of its brief, Massachusetts will demonstrate that the appellees' contention is without merit for several reasons. First, the clause does not alter or withdraw federal jurisdiction over hydroelectric projects licensed under Part I of the Act. Second, the clause does not grant any state any authority not already lawfully exercised prior to the passage of Part II: the clause therefore does not apply to the circumstances in this case.

(a) The Savings Clause Contained in Part II of the Act Does Not Restrict the Scope of Part I of the Act.

At the outset, it should be noted that the savings clause contained in §201(b) of the Act (16 U.S.C. §824[b]), by its own terms, does not apply to Part I of the Federal Power Act. Part II of the Act, including the savings clause in question, is contained in Subchapter II, entitled "Regulation of Electric Utility Companies Engaged in Interstate Commerce," of Chapter II of Title 16 of the United States Code. Part I of the Act is contained in a separate subchapter, Subchapter I, entitled "Regulation of Development of Water Power and Resources." Thus, if this Court should determine that the PUC's orders are preempted by Part I of the Power Act (see pp. __-__, supra), that finding alone would be sufficient to invalidate the PUC's orders, and no consideration of the effect of the savings clause is necessary.

(b) The Savings Clause Does Not Apply in the Circumstances of This Case.

To avoid the preemptive effect of Part II of the Federal Power Act, the New Hampshire Supreme Court construed §201(b) as congressional authorization for otherwise impermissible state regulation. However, rather than an affirmative grant of power to the states, §201(b) is simply a savings clause which defines the scope of federal authority, without conferring additional authority upon the states. This conclusion is evidenced not only by the plain meaning of the language employed and its legislative history, but also by a comparison with analogous savings clauses.

The scope of §201(b) must be assessed by its reference to [1] "lawful authority [2] now exercised" over the exportation of hydroelectric energy. The PUC's order does not fit into either of these categories.

(i) The PUC orders do not reflect "lawful authority now exercised."

By its decision in Public Utilities Comm'n v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927), this Court firmly established that the Commerce Clause prohibited the states from regulating the rates for the interstate sale of electric power at wholesale. Consequently, at the time of enactment of §201(b) in 1935, New Hampshire lacked the "lawful authority" purportedly represented by the challenged statute, since it could not constitutionally be employed to affect the wholesale rates for hydroelectric power. In light of the unequivocal Commerce Clause restriction on state power, a congressional intention to reverse the constitutional doctrine recently enunciated in Attleboro, and thereby augment the authority of the states, cannot be derived from the language of §201(b). Although the Court need go no farther than the plain language of §201(b) and should not speculate as to legislative intent through an analysis

of inconclusive legislative history, see, e.g., Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 and n.29 (1978), the scant legislative history provides little comfort to the appellees' cause.

The sole secondary source of legislative history is found in the remarks of Congressman Rogers of New Hampshire:

> Just one word further. I do want to call attention, if I have a moment, to the fact that as a result of the service rendered by the junior Senator from New Hampshire on the public service commission of our State, we, for a long time, have had a public service commission which properly protects the rights of the citizens as against these damnable curses; but the Senate bill as originally drawn would deprive certain States, I think five in all, of certain rights which they have over the exportation of hydroelectric energy which is transmitted across the State line. This situation has been taken care of by the House committee, and I hope when you come to it, section 201 of part II, that you will grant us the privilege to continue, as we have been for 22 years, to exercise our State right over the exportation of hydroelectric energy transmitted across State lines but produced up there in the granite hills of old New Hampshire.

79 Cong. Rec. 10527 (1935). Although the New Hampshire Supreme Court construed this expression of the purpose

of §201(b) as a positive grant of authority (J.S. App. 7a), the remark is more readily interpreted as an indication of the section's character as a savings clause. The suggestion that the Senate bill would deprive the states of existing rights and the request "to continue ... to exercise ... [the] right over the exportation of hydroelectric energy transmitted across State lines ...," confirm that the language was a savings clause and not an additive to state authority.

As noted, Part II was enacted to fill the regulatory gap created by Attleboro's holding that state regulation of interstate sale of power at wholesale impermissibly burdens commerce, even in the absence of federal regulation. United States v. Public Utilities Commission of California, 345 U.S. at 311; City of Colton, 376 U.S. at 215-216. Congress chose to fill this gap by vesting comprehensive and exclusive authority in a federal agency. Congress distinguished, however, between federal and state authority with §201(b), by leaving

to the states authority for sales at retail. City of Colton, 376 U.S. at 214. The savings clause at issue here is contained in the same sentence preserving this area of permissible state regulation. Since the latter cannot reasonably be construed as an affirmative grant of power to the states, additional authority over the exportation of hydroelectric power cannot be inferred from the language in §201(b).

This conclusion is reinforced by comparison to other statutory schemes in which Congress has permitted the exercise of state authority. For example, the McCarran Act, 15 U.S.C. §1011 et seq., expressly provided for state regulation of the insurance industry, in the wake of this Court's decision in United States v. South Eastern Underwriters Association, 322 U.S. 533 (1944), invalidating state legislation regulating insurance. In Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946), the Court sustained the delegation of authority to the states by the McCarran Act, in the face of a challenge that Congress

lacked the authority to expand the limits of state power. However, this conclusion was reached only by reference to several sections[15/] which established a Congressional intent to declare "expressly and affirmatively" that state regulation is necessary and in the public interest. Id. at 430. Similarly, in Commonwealth Edison Co. v. Montana,

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15/ Among the pertinent parts of the McCarran Act considered were the following:

> Sec. 1. The Congress hereby declares that the continued regulation and taxation by the States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be constrtued to impose any barrier to the regulation of taxation of such business by the several States.
>
> Sec. 2. (a) The business of insurance and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.
>
> (b) No act of Congress shall be construed to invalidate, impair or supercede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. ... 15 U.S. SS 1011-1012.

__ U.S. _, 49 U.S.L.W. 4957, 4963 (U.S. July 2, 1981), the Court declined to find that a state severance tax on coal frustrated federal legislation, in light of the express congressional authorization for state taxation.

The judicial elucidation of a congressional intent to permit otherwise impermissible state regulation under these statutory schemes must be contrasted with the simple preservation of existing state authority intended to define the preemptive effect of the federal legislation. In Lewis v. B.T. Investment Managers, Inc., 447 U.S. 27 (1980), the Court was presented with a claim that §7 of the Bank Holding Company Act, 12 U.S.C. §1846, conferred additional power on the states.[16/] In light of

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16/ Section 7 provides:

> The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries.

the objectives of the federal legislation and its history, the section could not be construed to authorize additional state legislation, but merely to define the preemptive effect of the federal statute. Id. at 49. This, of course, is the same result reached in the Court's construction of the savings clause of §201(a) which provides, in part, that federal regulation shall "extend only to those matters which are not subject to regulation by the States." 16 U.S.C. §824(a). In Connecticut Light and Power Company v. Federal Power Commission, 324 U.S. 515 (1945), the Supreme Court had occasion to construe the savings clause of §201(a). The Court rejected the power company's argument that the clause should be given a broad interpretation. It stated instead that "the policy declaration that federal regulation is 'to extend only to those matters which are not subject to regulation by the States' is one of great generality. It cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose." Id. at 527. The Court again emphasized

the narrow scope of this savings clause in its decision in United States v. Public Utilities Commission of California, 345 U.S. at 310, stating that "exceptions to the primary grant of jurisdiction in the section are to be strictly construed." Secondly, the Court applied §201(a) to emphasize, rather than limit, the sweeping and exclusive nature of FERC's jurisdiction.

In sum, it cannot be said that Congress intended by the language of §201(b) to grant New Hampshire the authority so at odds with the pervasive rate power of FERC.

As a further ground for refuting the PUC's interpretation of §201(b), Massachusetts also relies upon the plain meaning of the "now exercised" provision in the Act. Even if the "lawful authority" proviso of §201(b) could somehow be interpreted to include the patently unconstitutional activity of regulating interstate wholesale rates, it is not disputed by any party that the latent purported authority vested in the PUC by N.H. RSA 374:35 was never invoked in the 68-year history of the

statute until the PUC's order in 1980 which is the subject of this appeal. Certainly, New Hampshire was not "exercising" any purported authority under N.H. RSA 374:35 or any other source in 1935 when §201(b) was enacted. New Hampshire thus cannot claim that it has a right to continue some activity which the Federal Power Act and the Commerce Clause uncontestably would have prohibited but for the intervention of §201(b). The only authority that New Hampshire had exercised prior to 1980 was to allow the transmission of hydroelectric energy out of the state, unencumbered by discriminatory rate regulation. Of course, this was New Hamsphire's statutory and constitutional obligation; and, in any event, the authority to continue in conformance with this obligation is not at issue.

(ii) New Hampshire's Lawful Authority Under §201(b).

Despite the plain meaning of the phrase "lawful authority now exercised" the appellees argued, and the court below apparently agreed, that Congress must have

intended §201(b) to be an affirmative grant of power, since otherwise there would be little, if any, room for operation of the New Hampshire statute consistent with the Commerce Clause. While of course the congressional declaration contained in §201(b) is "relevant and entitled to respect" and "cannot be wholly ignored," Connecticut Light and Power Company, 324 U.S. at 527, to suggest, as appellees have done, that the clause is "an affirmation of state authority over any interstate sales for resale [of hydroelectric power], would be to speculate about a congressional purpose for which there is no support." California, 345 U.S. at 311. Indeed, "[i]t would have been curious for Congress to have approved a very special type of regulatory scheme for such a minimal fraction of the country's total power."[17/] Id. at 310 n.18. Instead, as

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17/ At the time Congress passed Part II (in 1935), four states, including New Hampshire, had statutes regulating the export of hydroelectric energy. Maine Rev. Stat.

footnote continued

this Court suggested in California, supra, the likely intent of the clause was with regard to possible state limitation of the physical flow of exported electrical power.[18/] California involved a challenge to by a Part I licensee federal jurisdiction under Part II of the Act on the ground that §201(a)[19/] left open the possibility of state regulation of wholesale rates and services under Part I,

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footnote 17/ continued

(1930), ch. 68, sec. 1; Wisconsin Stat. (1931), sec. 31.27; West Virginia Acts (1929), ch. 58. Maine has since repealed its law. Maine Public Laws (1955), ch. 402, p. 400. West Virginia's export statute was held unconstitutional on other grounds in 1931. Hodges v. Public Service Commission, 110 W.Va. 649, 159 S.E. 834 (1931). The Wisconsin statute is currently codified at Sec. 196: 375 Wisc. Stats. (1977).

18/ The authority to permit the exploitation of hydroelectric power outside the borders of the states, consistent with the federal statute and the Commerce Clause, is not without any substance. For example, there may well be authority for New Hampshire to take account of environmental damage or other similar impact as part of its "public interest" inquiry under state law.

19/ As previously noted, §201(a), 16 U.S.C. §824(a), provides in part that Part II provisions shall "extend only to those matters which are not subject to state regulation."

§20 (16 U.S.C. §813). The Supreme Court rejected this challenge. 345 U.S. at 302-310. In reaching its decision, the Court also reviewed the savings clause of §201(a). The Court saw the savings clauses contained in §201(a) and in §201(b) in an "apparently similar vein," noting that §201(b)

> "certainly does not go beyond §201(a) in limiting federal authority. This is true, not only because of the substantial similarity of the language, but also because it appears not to have been drafted with state rate regulation in mind. Rather, 79 Cong. Rec. 10527 indicates that the provision was intended to preserve the validity of certain state statutes prohibiting or regulating the volume of state power exported. ... It has been so construed. Safe Water Power Corp., 5 F.P.C. 221, 235."[20/]

Id. at 300-01 n.4 (emphasis added).

20/ FERC's interpretation of §201(b) should be accorded deference by this Court. In reaching its decision in California, supra, the Court relied in part on past FERC decisions stating, "We have often stated our sympathy with established administrative interpretations such as this." 345 U.S. at 315. See also Arkansas Louisiana Gas Co. v. Hall, __ U.S. __, 49 U.S.L.W. 4947, 4950 (U.S. July 2, 1981). Moreover, "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." New York State Department of Social Services v. Dublino, 413 U.S. 405, 421 (1973) citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

As discussed above, the PUC is apparently unwilling to order a physical cessation of the flow of hydroelectric energy from New Hampshire[21/] because it would likely cause the state to lose the benefits of participation in NEPOOL. However, although the full development of today's complex interstate grid (see, e.g., California, 345 U.S. at 302; Jersey Central Power & Light Co. v. Federal Power Commission, 319 U.S. 61 [1943]) and the establishment of elaborate pooling arrangements such as NEPOOL may make physical limitations on the export of hydroelectric energy impossible or undesirable, this is no justification for an expansion of §201(b) to include "back-door" ratemaking. Moreover, there is nothing in either the legislative history or statutory language of §201(b) to indicate that Congress undertook to examine in any way what export restrictions, if any, were lawful,

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21/ The Commonwealth decidedly does not concede that New Hampshire could constitutionally impose physical restrictions intended to conserve hydroelectric energy resources. See Hughes v. Oklahoma, 441 U.S. 322 (1979).

possible or desirable, or to indicate its approval of any particular restrictions. Rather, it simply skirted the issue by preserving "lawful authority now exercised," whatever that might be. It would be eminently reasonable for Congress to leave to the courts the question of what authority, if any, could be lawfully exercised. The question of the scope of the §201(b) savings clause is obviously a matter incidental to the central purpose of the Federal Power Act, and as this Court has stated, Congress frequently leaves to the courts the issue of determining which restrictions burden interstate commerce. See Southern Pacific Company v. Arizona, 325 U.S. 761, 770 (1945). This is the very question which Massachusets poses in the next section, answering that the PUC's order violates the Commerce Clause.

II. THE NEW HAMPSHIRE STATUTE VIOLATES THE COMMERCE CLAUSE.

The Court should find that the PUC's order is pre-empted by Part I and Part II of the federal statute and that this result is not altered by the "saving clause"

found in §201(b). In this section of the brief, Massachusetts argues that the PUC order also represents a clear violation of the Commerce Clause.

The analysis of the Commerce Clause implications of the New Hampshire hydroelectric export statute, as applied by the PUC, requires two distinct but related inquiries. The first is whether the statute, standing alone, burdens interstate commerce in violation of the Commerce Clause. The second is whether Congress, through the savings clause of §201(b) of the Federal Power Act, has authorized the state's regulation free from the restraints of the Commerce Clause. See Lewis v. B. T. Investment Mangers, Inc., 447 U.S. at 35.[22/]

22/ This two-stage analysis employed in Lewis, flows from the long-standing interpretation of the Commerce Clause as not simply authorization for congressional action, but also as a restriction on the scope of permissible state regulation even in the absence of conflicting federal legislation. Id. Hughes v. Oklahoma, 441 U.S. 322, 326 (1979); H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 534-538 (1949). Congress may, however, exercise indirectly its power by conferring on the states an ability to restrict the flow of interstate commerce. Lewis v. B. T. Investment Managers, Inc., supra at 44; H. P. Hood & Sons, Inc. v. DuMond, supra at

(footnote continued)

A. The Impermissible Burden on Interstate Commerce.

The first inquiry is easily answered in light of the holding in Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927), that the Commerce Clause entirely forecloses state regulation of the rates for the interstate sale of electric power at wholesale.[23/] Following the principles of Missouri v. Kansas Gas Co., 265 U.S. 298 (1924), the Court concluded that the interstate transmission of electricity is not a

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(footnote 22/ continued)

542-543. Therefore, the first inquiry entails the traditional Commerce Clause analysis, while the second stage ascertains the existence of congressional authorization for the otherwise impermissible state regulation of interstate commerce.

In the next section, it is argued that if the Court were to construe §201(b) as a grant of power to New Hampshire, serious and novel constitutional issues would be presented where, as here, Congress exercises its authority so as to favor a few states over others.

23/ Indeed, the New Hampshire Supreme Court virtually conceded that the PUC's action was unconstitutional, necessitating its reliance on the savings clause of §201(b) (J.S. App. 10a).

local transaction but essentially national in character, with the result that state regulation of the rates places a direct burden on interestate commerce in violation of the Commerce Clause. Attleboro, 273 U.S. at 88-89.[24/]

Judged by the Attleboro standard, the challenged action is plainly impermissible because it is intended to reserve the economic benefits of hydroelectric power for New Hampshire consumers, with the concomitant increase in the costs to Massachusetts and Rhode Island consumers, by the subsequent establishment of a discriminatory pricing mechanism. Although the New Hampshire Supreme Court characterized the PUC's order as the "control of the assignment of power" and not the "control of rates" (J.S. App. 12a), it is the practical operation of the statute which is dispositive. Lewis v. B. T. Investment Managers, Inc., 447 U.S. at 37; Hughes v.

24/ Cf. Maryland v. Louisana, 101 S.Ct. at 2134 ("Gas crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey.")

Oklahoma, 441 U.S. at 336. In this instance, the effect is the regulation of the rates for the interstate transmission, with the requirement that NEP alter its pricing mechanism, to permit the retention of the economic benefits of inexpensive hydroelectric power for New Hampshire consumers. As such, the challenged order is precisely the type of rate regulation strictly forbidden by Attleboro.

But even if the PUC's order were appropriately construed as resource allocation rather than rate regulation, it is equally invalid under the Commerce Clause. Beginning with West v. Kansas National Gas Co., 221 U.S. 229 (1911), efforts by the states to restrict the export of natural resources have been consistently rejected by the Court. In West, the Court invalidated an Oklahoma statute designed to prohibit the exportation of natural gas, despite the state's claim of a right to conserve its resources for the benefit of residents at the expense of other states. Then, in Pennsylvania v. West Virginia, 262 U.S. 553 (1923), the Court held that a West Virginia statute which required natural gas producers to

satisfy local needs before any interstate transportation, impermissibly burdened interstate commerce. This line of cases has recently been reaffirmed to foreclose state hoarding of natural resources such as minnows, Hughes v. Oklahoma, supra, and landfill areas, Philadelphia v. New Jersey, 437 U.S. 617 (1978).

State regulation restricting the export of natural resources reflects the parochialism abhorent to the Commerce Clause and requires the invocation of the "virtually per se rule of invalidity" for its simple economic protectionism.25/ Philadelphia v. New

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25/ In light of its complete retention of the economic benefits of hydroelectric power, New Hampshire's action cannot reasonably be construed as an incidental burden on interstate commerce, which might be justified by a legitimate local purpose and the absence of nondiscriminatory alternatives. See Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 353 (1977); Hughes v. Oklahoma, 441 U.S. at 336. States are without power to foreclose articles of commerce from interstate transactions "on the ground that they are required to satisfy local demands or because they are needed by the

(footnote continued)

Jersey, 437 U.S. at 623-624. Such state efforts chip away at the conviction of the Framers that "in order to succeed the new Union would have to avoid the tendencies toward economic Balkanization."26/

Thus viewed as either rate regulation or resource allocation, New Hampshire's action constitutes simple economic protectionism that directly burdens interstate commerce in violation of the Commerce Clause.

(footnote 25/continued)

people of the state." Foster-Fountain Packing Co. v. Haydal, 278 U.S. 1, 10 (1928). Thus, the economic welfare of its residents does not permit the state to evade the limitations of the Commerce Clause under the guise of the legitimate exercise of state power. See Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

26/ Protectionist activity by one state inevitably invites a similar response from other states. This, of course, is the precise evil which the Commerce Clause was intended to avoid. Indeed, there is a strong suggestion in the record that the PUC was motivated, at least in part, by a desire to retaliate for perceived harm to New Hampshire resulting from Massachusetts actions with respect to the financing of the Seabrook nuclear facility located in New Hampshire. See J.S. App. 36a-38a.

B. The Absence of Congressional Authorization.

The second inquiry focuses upon the existence of congressional authorization for otherwise impermissible state restriction of interstate commerce. Lewis v. B.T. Investment Managers, Inc., 447 U.S. at 44. The New Hampshire Supreme Court confronted by the clear Commerce Clause barrier to the PUC's orders, again relied upon the savings clause of §201(b) of the Federal Power Act (16 U.S.C. §824[b]) to find congressional consent for the exercise of the commerce power. (J.S. App. 10a-11a). However, for the same reasons outlined in the discussion of the preemptive effect of Part II of the Federal Power Act (pp. 34 - 64, supra), §201(b) cannot be construed as an exemption of New Hampshire from the constitutional scheme for the federal regulation of interstate commerce. As noted, the provision does not permit the state's regulation of interstate wholesale electric rates, and the Commerce Clause defects have not been removed.

III. THE NEW HAMPSHIRE STATUTE VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE.

Article IV, §2 of the United States Constitution provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." In essence, the objective of that clause is to "constitute the citizens of the United States one people." Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868). In furtherance of this objective, the Privileges and Immunities Clause "relieves [state citizens] from the disability of alienage in other States" and "it inhibits discriminatory legislation against them by other States." Id.

New Hampshire's application of RSA 374:35 directly implicates the fundamental concerns of the Privileges and Immunities Clause.[27/] See Baldwin v. Fish and Game

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27/ Because of "the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, §2, and the Commerce Clause", Hicklin v. Orbeck, 437 U.S. 518, 531 (1978), much of what has been discussed in Section II, above, applies here as well. However, "the failure to find a commerce clause violation should not preclude a finding that Article IV has been violated." Note, " A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV," 92 Harv.L.Rev. 1461, 1471 (1979).

Comm'n of Montana, 436 U.S. 371 (1978). Hydroelectric power is produced and transmitted by a private company in New Hampshire through an interstate transmission grid to consumers in Massachusetts. This is the modern day equivalent of consumers of one state travelling to another state, either personally or through middlemen, to purchase coal for use in running their industry and warming their homes.[28/] New Hampshire has imposed the most onerous and sweeping burden on this essential activity — it purports to prohibit it with respect to

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28/ The Privileges and Immunities Clause requires that States treat citizens of other States with the "norm of comity" envisioned by the Framers. See Baldwin v. Fish and Game Comm'n, 436 U.S. 371, 382 (1978). The Clause operates to bar state action directed toward citizens of other states who are prohibited or inhibited from some activity within the state. The fact that Massachusetts citizens do not themselves, in fact, cross the New Hampshire borders is irrelevant. The very nature of the technology used by NEPOOL makes this unnecessary. Massachusetts citizens are being denied the ability to purchase electricity generated by water within New Hampshire on an equal basis, solely because they reside out-of-state.

hydroelectric power. At the least, the effect of New Hampshire's actions is to impose a tax through the imposition of a higher rate for electricity in Massachusetts. Thus, New Hampshire directly exacts money from Massachusetts consumers and deposits it in the pockets of New Hampshire consumers. It is just this type of imposition on citizens of another state[29/] for the benefit of the acting state that this Court has found to be fundamentally at odds with the purpose of forming a more perfect Union. See Austin v. New Hampshire, 420 U.S. 656, 661 (1975), quoting Corfield v. Coryell, 6 F. Cas.

29/ Since the Privileges and Immunities Clause "protects people, not States," Pennsylvania v. New Jersey, 426 U.S. 660, 665 (1976), Massachusetts raises this claim on behalf of its citizens. Clearly, this is an instance where "a great many citizens in [Massachusetts] are themselves consumers of [electricity supplied by NEP] and are faced with increased costs aggregating millions of dollars per year." Maryland v. Lousiana, supra at 2125. NEP, a corporation, is not a citizen within the meaning of the Privileges and Immunities Clause. See Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869).

546, 552 (No. 3,230) (CCED Pa. 1825). If discriminatory hiring practices on oil and gas projects implicate an area "of profound national importance," Hicklin v. Orbeck, 437 U.S. at 534, then an attempt to directly embargo the use or benefits of hydroelectric power surely must also implicate fundamental concerns under the Privileges and Immunities Clause.30/ Unlike a non-resident's desire to hunt elk in Montana, the operation of New Hampshire's statute deprives Massachusetts citizens of a resource which is "sufficiently basic to the livelihood of the Nation...." Baldwin v. Fish and Game Comm'n, supra at 388. Whatever may be the appropriate dividing line separating fundamental from

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30/ Reading Hicklin and Baldwin together, the Court has adopted a two-step analysis. First, it is determined if a right or activity is "fundamental" and, if so, whether "non-residents are a cause, in fact, of the problem with which the state seeks to deal and whether the discrimination practiced against them is substantially related to the problem." "The Supreme Court, 1977 Term," 92 Harv.L.Rev. 57, 75-76 (1978). See also Simpson, "Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV," 128 U.Pa.L.Rev. 379, 382 (1979).

non-fundamental rights protected by the Privileges and Immunities Clause, it is plain that, like the oil and gas in Alaska, the hydroelectric power in New Hampshire is "of profound national importance." Hicklin v. Orbeck, 437 U.S. at 534.31/

Moreover, New Hampshire cannot demonstrate any legitimate and rational basis upon which to discriminate against non-residents. See Hicklin v. Orbeck, supra at 531 ("insufficient justification for discrimination"); Austin v. New Hampshire, 420 U.S. at 663 ("heightened concern for the integrity of the Privileges and Immunities Clause"); Toomer v. Witsell, 334 U.S. 385, 396 (1948) ("no

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31/ The critical role which energy plays in our industrial society hardly needs citation. Significantly, this Court's recent docket reflects what appears to be a "new war...over the control and exploration of the nation's natural resources...which [has] acquired specific significance in an age of anxiety over shortage of energy and other natural resources" Hellerstein, "Hughes v. Oklahoma: The Court, The Commerce Clause, and State Control of Natural Resources," 1979 Sup.Ct.Rev. 51, 71. There is no question that the development and utilization of hydroelectric power has been recognized as an important national resource and as being a key factor in addressing this Nation's energy needs. See generally Brief Amicus Curiae of Edison Electric Institute.

substantial reason for discrimination").[32/] Massachusetts citizens are not the source of any injury which the PUC hopes to soothes. Nor does New Hampshire attempt to justify the PUC's order as being anything other than economically motivated. Indeed, New Hampshire's actions invite the sort of retaliation by Massachusetts and other states in the New England Power Pool (NEPOOL) that is antithetical to "the structural balance essential to the concept of federalism."[33/] Austin v. New Hampshire,

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32/ Once it is demonstrated that a state has discriminated against non-residents in a area of fundamental concern, the burden shifts to the state to make a stronger showing than simply "rational basis." It has been suggested that this resembles the intermediate standard of reivew used in other contexts. See L. Tribe, American Constitutional Law, 411 (1978) and Note, "Hughes v. Oklahoma and Baldwin v. Fish and Game Commission: The Commerce Clause and State Control of Natural Resources," 66 Va.L.Rev. 1145, 1146 (1980).

33/ Edward F. Burke, Chairman of the Rhode Island Public Utilities Commission, testified that his state "would engage in retaliation, obviously, as last resort." He observed, however, that the NEPOOL mechanism "is very finely tuned" and "once you start withholding power... it would have an unraveling effect." Testimony of Edward F. Burke, January 29, 1980 PUC hearing, p. 74.

420 U.S. at 662. "Since nonresidents are not represented in the taxing state's legislative halls, [citation omitted], judicial acquiescence in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own state." Id. Such reactions are especially to be discouraged in this context where an entire region of the country would suffer from a breakdown of the mutually beneficial NEPOOL arrangement.

IV. IF §201(b) OF THE FEDERAL POWER ACT DOES APPLY IN THIS CASE, IT IS AN UNCONSTITUTOINAL EXERCISE OF THE COMMERCE POWER, OR, ALTERNATIVELY, IT VIOLATES THE TENTH AMENDMENT OR THE PRIVILEGES AND IMMUNITIES CLAUSE.

Serious constitutional questions are raised if the Supreme Court of New Hampshire is correct in its conclusion that §201(b) of the Federal Power Act is a license for New Hampshire to carry on otherwise unconstitutional activity.[34/] Assuming, for sake of

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34/ It is unlikely that Congress intended, by the adoption of §201(b), to permit one state to be able to pursue a narrow, balkanized policy at the direct expense of sister

(footnote continued)

argument, that that conclusion is correct, the following situation is created: (1) New Hampshire, and perhaps one other state in the Union[35/] may embargo hydroelectric power destined for private interstate shipment at wholesale. (2) Massachusetts or other affected states may not "retaliate," at least in the same manner, even if they wished to do so, because they do not have the benefit of a special exemption from the prohibitions of the Commerce Clause. (3) Thus, New Hampshire may retain

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(footnote 34/ continued)

states and to thereby act in a manner that would otherwise be plainly unconstitutional. The discussion in this section of the brief, therefore, is relevant as a further guide to the statutory interpretation of §201(b). See Lewis v. B.T. Investment Manager, Inc., 447 U.S. at 49 (federal statute interpreted to apply "only to state legislation that operates within the boudaries marked by the Commerce Clause."). See also National Leaque of Cities v. Usery, 426 U.S. 833, 858 n.2 (1976) (Brennan, J., dissenting) (describing "Court's reluctance to interpret legislation to alter the federal-state balance of power").

35/ Only New Hampshire and Wisconsin arguably could avail themselves of a purported exemption arising from §201(b). (Note 17, supra).

the substantial benefits of regional power pooling, not the least of which is essential coal, oil, hydroelectric and nuclear power from Massachusetts, even while reserving the benefits of locally produced hydroelectric power for its exclusive use.

Framed in these terms, the question presented is whether the states, in consenting to the federal compact, intended that Congress could enact laws under the Commerce Clause for the purpose and with the effect of producing such an onerous discrimination among states. More particularly, this case poses the question whether the Commerce Clause was intended to afford New Hampshire the privilege of restricting or essentially taxing the export of electrical power — a commodity vital in this age to the health and security of the citizens of all the states. This Court should be singularly reluctant to interpret the Commerce Clause, or any other federal constitutional provision or law, as working such a radical and patently unintended alteration of the federal-state

and interstate balance. Cf. Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872); United States v. Bass, 404 U.S. 336, 349 (1971); L. Tribe, American Constitutional Law, §5-8 at 243; id., §6-31 at 404 ("[i]nsofar as federalism-based limits on state action also affirm underlying personal rights against government generally, Congress should be no more able to authorize state invasion of such rights than either Congress or the state are able independently to invade them").

Massachusetts acknowledges that the "Commerce Clause is a grant of plenary authority to Congress," Hodel v. Virginia Surface Mining and Reclamation Association, Inc., __U.S. _, 49 U.S.L.W. 4654, 4657 (U.S. June 16, 1981) and that "when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational." Id. The Commonwealth contends, however, that Congress' power under the Commerce Clause is necessarily limited by the underlying purposes of that constitutional provision and that a

federal statute which grants authority to few states, at the same time that it denies the same power to other states, is impermissible and cannot withstand scrutiny. This view is strengthened in light of the related analysis called for by Massachusetts' companion claims that an interpretation which finds §201(b) to be an affirmative grant of power to New Hampshire would violate the Privileges and Immunities Clause and the Tenth Amendment of the Constitution.

A. The Commerce Clause.

In the discussion of the Commerce Clause above (see Section II, supra), at issue is the authority of New Hampshire — through its statute and administrative agency — to take action in violation of the Commerce Clause. A different issue is presented, however, when Congress regulates the flow of interstate commerce and does so "by conferring on the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." Lewis v. B. T. Investment Managers,

Inc., 447 U.S. at 44. In Massachusetts' view, this affirmative constitutional authority, although exceedingly broad, must still be exercised consistent with basis principles underlying the Union. See Katzenbach v. Morgan, 384 U.S. 641, 651 (1966); Gibbons v. Ogden, 22 U.S. [9 Wheat.] 1, 203 (1824). As already discussed above, the purpose of the Commerce Clause was to enhance, not retard trade so that "that borders between the States are essentially irrelevant." Commonwealth Edison Co. v. Montana, 49 U.S.L.W. at 4960. Where Congress acts under this Clause, it has done so to nurture and protect interstate commerce or to eradicate some evil which interferes with free trade. This is the only legitimate end permitted by the Constitution. Heart of Atlanta Motel v. United States, 379 U.S. 241, 262 (1964).[36/]

36/ Of course, where Congress acts under the scope of the Constitutional Amendments, it can be said that such "new" power may override the expectations of the Framers. Cf. e.g., City of Rome v. United States, __ U.S. __, 100 S.Ct. 1548, 1563-1564 (1980); Fitzpatrick v. Bitzer, 427 U.S. 445, 455-456 (1976).

As this Court has observed:

> The simple few words of the Commerce Clause... reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Hughes v. Oklahoma, 441 U.S. at 325-326. To permit Congress to rely upon the Commerce Clause in a manner which undermines the very purpose of that provision would cut against all that must be "implied from the States' role in the constitutional scheme." Massachusetts v. United States, 435 U.S. 444, 455 (1978). In short, the Commerce Clause would be perverted to become a tool of national divisiveness, ulitimately destroying "a welfare which transcends that of any State," West v. Kansas Natural Gas Co., 221 U.S. 229, 255 (1911) and the principle that "our economic unit is the nation." H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. at 537.

The decision of this Court in Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946), is not to the contrary. Benjamin held that in enacting the McCarran Act, Congress validly preserved to the states the right to regulate or tax the insurance business even though such activites would otherwise have violated the Commerce Clause. However, the McCarran Act applied equally to all states; it made no distinctions among the states and established no preferences. Any state could impose a tax on, or otherwise regulate, out-of-state insurance companies. The effect of the congressional action could thus be said to have been to define a type of activity — the insurance business — that was to be deemed to be sufficiently outside the concern of the Commerce Clause to justify permitting the several states to regulate the industry. In sharp contrast, §201(b) would not declare the interstate transmission of electrical energy to be outside of that constitutional ambit. Instead, it would grant a

valuable and special privilege to a handful of states, a privilege which was not available to the remaining states and which acted to place those states in a decidedly inferior position.[37/]

Nor do the cases of Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 616 (1950) or South Carolina v. Katzenbach, 383 U.S. 301, 328-29 (1966), cited by the Supreme Court of New Hampshire, lend support to the position that this Court has condoned seriously prejudicial and uneven treatment by Congress of the States under the Commerce Clause. Both cases dealt with national congressional policies that, when put

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37/ It is tempting to suggest that the remedy for Massachusetts and Rhode Island with respect to such treatment can be and should be found in Congress. See Commonwealth Edison Co. v. Montana, supra, 49 U.S.L.W. at 4962 (Marshall, J.) and 4969 (White, J., concurring); Massachusetts v. United States, 435 U.S. at 456. Such a course is not required, however, where the integrity of the State's role in the Union is at issue. See National League of Cities v. Usery, 426 U.S. at 841 n. 12. Put another way, Massachusetts should not have to re-argue in the halls of Congress basic principles settled at the Constitutional Convention.

into effect, had disparate impacts on the several states. In neither case did Congress, in effect, single out one or a few states for beneficial treatment at the direct expense of the other states. In contrast, this Court has consistently held that a core purpose of the Commerce Clause is to encourage national uniformity in commercial transactions and to "preserve equality of opportunity and treatment among the various communities and States concerned." Attleboro, 273 U.S. at 82, quoting Missouri v. Kansas Gas Co., 265 U.S. 298, 310 (1924).

This is not an instance of simply "a statute's lack of uniform geographic impact." Hodel v. State of Indiana, __ U.S. __, 49 U.S.L.W. 4667, 4671 (U.S. June 16, 1981). Congress' action, if it indeed gave a few states special leave to engage in economic protectionism, is clearly arbitrary, irrational, and contrary to the Commerce Clause.[38/]

38/ It might be argued that §201(b) is simply a "grandfather clause." As such, it would withstand attack under an equal protection analysis only where there is a

(footnote continued)

B. Tenth Amendment

Even if the Commerce Clause does not itself prohibit Congress from providing special privileges to one or a few states, constraints "external" to that clause require that §201(b) not be construed to create such a result. One external source is the Tenth Amendment.

That the Tenth Amendment may, in appropriate circumstances, act directly to restrict congressional power under the Commerce Clause can no longer be doubted. National League of Cities v. Usery, 426 U.S. 833 (1976). This is but one application of the more general

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(footnote 38/ continued)

demonstrated rational basis for such a provision. See New Orleans v. Dukes, 427 U.S. 297, 304 (1976). No such showing has been made here. In any event "[v]ery different principles govern even economic regulation when constitutional provisions such as the Commerce Clause are implicated, or when local regulation is challenged under the Supremacy Clause as inconsistent with relevant federal laws or treaties." Id. at 304 n.5. While the Dukes Court was considering the Commerce Clause's impact on the States, the same rationale applies with respect to the scope of Congress' authority.

principle that "[l]egislation, even if authorized by the commerce clause, must be consistent with the Bill of Rights and other external restrictions of congressional power, restrictions which operate to protect not only individual interests but state interests as well." L. Tribe, American Constitutional Law, §5-8 at 242-243.

The essence of the Tenth Amendment is that Congress "may not exercise power in a fashion that impairs the States' integrity, or their ability to function effectively in a federal system." Fry v. United States, 421 U.S. 542, 547 n.7 (1975). Put in a slightly different form, Congress may not treat the states in a manner which would be "contrary to the structural assumptions of the Constitution as a whole." L. Tribe, supra, §5-20 at 301. If one, or even a handful, of states are elevated to a position from which, under the cloak of congressional protection, they may gain advantages over neighboring states in areas of crucial concern such as energy, then a basic "structural assumption" of the Constitution has been violated.

An analysis of Congress' enactment of §201(b) (assuming that it was intended to afford to New Hampshire the authority exercised by the PUC) does not, however, fit neatly into the three part Tenth Amendment test recently articulated in Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 49 U.S.L.W. at 4660. There, the Court considered a challenge to Congressional regulation of private activity which did not directly infringe on the "States as States," and allowed the States a regulatory role, while at the same time pre-empting certain police powers. In this instance, Congress has economically favored a few States and prohibited the balance of the Union from exercising similar powers. Although Congress' grant of authority to New Hampshire would permit regulation of private parties (NEP), as did the statute in Hodel, the direct and intended effect here is to treat differently the other "States as States" — by denying them the same power. Similarly, one of the accepted "attribute[s] of state sovereignty," National League of Cities, supra at 845 — even-handed

treatment by Congress — would have been stripped.[39/] Hodel v. State of Indiana, 49 U.S.L.W. at 4671.

Massachusetts does not rely upon the ultimate financial impact of the PUC's order on the Commonwealth and its citizens. Cf. Hodel v. Virginia Surface Mining and Mining Reclamation Association, Inc., 49 U.S.L.W. at 4661 n.31 and n.33. Instead, it is the unwarranted and unsupported favored treatment of a few states, at the direct expense of others, which strikes a blow to the Tenth Amendment.

C. Privilege and Immunities Clause.

A second "external" constraint on congressional exercise of the Commerce Clause power may be found in the Privileges and Immunities Clause of article IV, §2.

39/ The third prong of the Hodel v. Virginia Surface Mining and Reclamation Ass'n test is whether "the States' compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional functions." Id. at 4660. This requirement has no application to this case.

The operation of RSA 374:35, as assumedly condoned by §201(b) of the Federal Power Act, violates the privileges and immunities of the citizens of the Commonwealth. Although the court below held that the Privileges and Immunities Clause does not act as a restraint on Congress, (J.S. App. 9a) and this Court apparently has not squarely ruled on the question, Massachusetts submits that the Clause must be interpreted so as to prevent Congress from authorizing States to infringe upon the national citizenship iterests of all citizens. See L. Tribe, supra, §6-31 at 403 n.18. The Privileges and Immunities Clause appears in the "State's Relations Article" which also includes the provision for the admission of new states, U.S. Const. art. IV, §3. It was this provision which was the basis for the "equal footing" constraints upon Congress enunciated in Coyle v. Smith, 221 U.S. 559, 573 (1911). In addition, it is not without significance that the mutual precursor to both the Commerce Clause and the Privileges and Immunities Clause, the Fourth

Article of the Articles of Confederation, closely intertwined the concepts of privileges and immunities, equal treatment or equal footing of states, and national uniformity and equality in interstate commerce. See Hicklin v. Orbeck, 437 U.S. at 523; Baldwin v. Fish and Game Comm'n, 436 U.S. at 379 n.17.

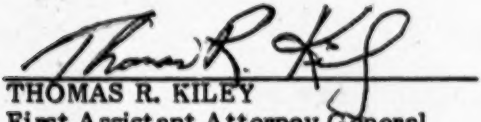
In sum, the interpretation of §201(b) urged by appellees implicates basic constitutional concerns. Since Congress is no more able to ignore the structural integrity of the Union than are the States, §201(b) must be found unconstitutional if construed to sanction the challenged action of New Hampshire.

CONCLUSION

For the reasons stated above, the decision of the New Hampshire Supreme Court should be reversed.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL



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APPENDIX

STATUTORY AND CONSTITUTIONAL APPENDIX

The pertinent provisions of Part I of the Federal Power Act, 16 U.S.C. §§ 792-823, are as follows:

SECTION 4, 16 U.S.C. § 797

The Commission is hereby authorized and empowered —

• • •

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations. Provided further, That no license affecting the

navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become part of the records of the Commission: Provided further, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: And provided further, that upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * *

SECTION 10, 16 U.S.C. § 803

All licenses issued under this Part [I] shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for

other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * *

SECTION 20, 16 U.S.C. § 813

* * *

. . . [W]henever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties, or such States are unable to agree through their properly constituted authorities on the services to be rendered, or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

* * *

SECTION 23, 16 U.S.C. § 817

* * *

(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

• • •

The pertinent provisions of Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k, are as follows:

SECTION 201, 16 U.S.C. § 824

(a) It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this [Part II and Part III] and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) (1) The provisions of this [Part II] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this [Part II and Part III], over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

• • •

(c) For the purpose of this [Part II], electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this [Part II], means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this [Part II and Part III] means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of [Sections 210, 211 or 212 of this Act]).

• • •

SECTION 205, 16 U.S.C. § 824d

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may

designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full

hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

* * *

SECTION 206, 16 U.S.C. § 824e

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory

or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

* * *

THE COMMERCE CLAUSE

United States Constitution, Art. I, §8, cl. 3. The Congress shall have Power

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;.....

* * *

THE PRIVILEGES and IMMUNITIES CLAUSE

United States Constitution,

Art. IV, §2, cl. 1

The citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States.

THE SUPREMACY CLAUSE

United States Constitution,

Amend. VI, par. 2

* * *

This Constitution, the the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

THE TENTH AMENDMENT

United States Constitution,

Amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.